

The Debt Burden: An African Perspective

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I. Introduction

Despite the sharply contrasting views, most commentators would doubtlessly agree on the gravity of the subject of debt burden that many impoverished developing countries owe to wealthy countries and international financial institutions (IFI). If people need human rights and democracy, the African and the “Third World”¹ poor people need them most of all. They need them to protect themselves against further exploitation and to insist on a model of development that is not based on crude numbers, but takes account of life as it is actually lived by ordinary people.² African external debt has been recently identified as a matter of great concern to the continent.³ Some of the poorest sub-Saharan African countries spend up to 25 percent of their revenues in debt service.

The debt problem is not an aberration.⁴ A number of factors are responsible for it. Debt is inherent in the development strategies that Africa has been pursuing, in the location of Africa in the world economy, and in the prevailing international division of labor. Its per-

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1. Alfred Sauvy claimed that he coined the term “Third World” in 1952, patterned on the Third Estate of the 1789 French Revolution. Already in 1956, a Paris journal, *Tiers Monde*, adopted the term that now identifies a group of the new states of Africa, Asia, and Latin American nations. They are often called the less developed, developing, underdeveloped, the non-industrialized, the poor, the backward, and/or the South.

2. Kofi Annan, Address to the Annual Convention of the American Association of Magazine Publishers and Editors (Oct. 19, 1998), in Press Release: Secretary-General Calls United Nations Tailor-made Forum for Collective Effort to Address Global Financial Crisis, U.N. Doc. SG/SM/6759 (1998), available at <http://www.un.org/Docs/SG/quotable/6759.html>.

3. Secretary-General of the Organization of African Unity, Salim Ahmed Salim, Executive Secretary of the United Nations Economic Commission for Africa, K.Y. Amoako and President of the African Development Bank, Omar Kabbaj, in a joint statement on June 3, 1998, put the African foreign debt at \$315 billion. They urged the international community to take a more flexible stance and consider additional initiatives, as well as ensure that adequate resources are made available to the debt problem of African countries.

4. See CLAUDE AKE, *DEMOCRACY AND DEVELOPMENT IN AFRICA* (1996).

sistence and magnitude underline the limitations of present development strategies and the difficulties of overcoming them.⁵

At the end of World War II—a war caused by colonialism—empires crumbled and hopes blossomed everywhere. African leaders had high hopes of their own, firmly believing that the key to development and material comfort depended on attaining political independence of the colonized territories.⁶

This article focuses on African debt⁷ crisis, paying particular attention to that portion of debt owed to sovereign wealthy countries and international financial institutions. The crisis is not merely one of macroeconomic indicators, but one also encompassing the political stability of these countries and the human costs of economic policies. For African debtor countries, the debt burden has spawned grave political and social problems.

On the political front, the surge in recent years of populist candidates in African countries may sour relations between wealthy Western countries and African debtors since these leaders, based on pressures from their citizens, are more likely to challenge onerous debt servicing than were their predecessors. The recent political changes in various parts of Africa correlate with growing discontent, with social ramifications of current economic conditions. While the poor bore the impact of the debt burden disproportionately, they benefited little from the foreign loans. Thus, the societal costs of economic austerity measures and policies demand a critical re-examination of the debt renegotiations framework. For instance, depressing economic conditions were responsible for the current brain drain in Nigeria.⁸

Part I of this article describes the history and background of the present African debt burden. Part II examines the magnitude of the debt problem and its practical effect on the human rights of the people. Effort will be made to attempt an analysis of the connection between debt, debt relief, and human rights. Any examination of the question of forgiveness or relief of debt owed by African countries would require a discussion of the international law jurisprudence on the matter. Part III of this article shall explore the legal basis for the request for debt forgiveness by African countries. It shall be argued that there is sufficient state practice to support a claim for an emerging international customary law recognizing debt forgiveness in the unique circumstances of the African debt problem. Next, the case will be made for strategies that the wealthy countries and international financial institutions could take to make debt relief meaningful in order to strengthen the human rights of the poor people.

A. THE BACKGROUND: HISTORICAL PERSPECTIVES

The historical background of the huge debt resulting mainly from external borrowing, which the African countries owe wealthy west-European countries and international finan-

5. *See id.*

6. The First President of the Republic of Ghana, Osagyefo, Dr. Kwame Nkrumah, preached a text for the Third World new leaders: "Seek ye first the political kingdom, and all else will follow."

7. About 90% of the debt of African countries is represented by long-term borrowings or their drawings from the International Monetary Fund. Most of Africa's long-term debt (about 96%) was either publicly contracted or publicly guaranteed. Accordingly, it could be characterized as sovereign debt.

8. In a recent Conference of the Nigerian People and Organization (CONPO), held in Atlanta on September 17–20, 1998, it was revealed that Nigeria has the greatest number of educated foreigners in the United States. There are many Nigerian bankers, business managers, computer scientists, pharmacists, engineers, journalists, lawyers, medical doctors, nurses, professors, and scientists in the country. In 1997, it is estimated that Nigerians sent home \$168 million through Western Union to their desperately needy family folks.

cial institutions, dates back to the colonial period. Often in modern times in discussing the African debt problem, such incidents as colonialism (and its political legacy), slave trade, etc., are either not touched at all or not given their due weight as contributing factors to the huge debts owed. These factors are important and not irrelevant to the problem. Alone or in combination they could be and are indeed serious impediments to development in African countries. The current political and economic problems, which African nations faced and are facing since independence, originated during the periods of colonialism and the slave trade.

1. *The Political Legacy of Colonialism*

The nature of colonialism in Africa was significantly different from the colonial experiences of the Americas, Europe, and Asia. The colonial state redistributed land and determined who should produce what and in what quantity.⁹ It attended to the supply of labor, including forced labor.¹⁰ The colonial masters adopted various methods to colonize the African territories. The most instructive was the promulgation of administrative instruments and tax legislation intended to induce the breakup of traditional social relations of production.

Despite long-enduring resistance by Africans, one of the most effective methods of colonization was through the process of infiltration, which steadily advanced until the stage of effective occupation could be reached behind the screen of "treaties of protection" (sometimes described as "cession" treaties). These were "signed" by chiefs who could seldom or never have understood the intentions of their new "protectors."¹¹

The colonial state went into the business of education to ensure that workers would perform the jobs they were required to do. The nature of infrastructure put in place by the colonial state was carefully thought out to satisfy its immediate needs. For example, it built roads, railways,¹² and ports to facilitate the collection and export of commodities as well as the import of manufactured goods.¹³ In fact, the colonial state controlled every aspect of the colonial economy to maintain its power and domination and to realize the economic objectives of colonization.¹⁴

Colonial jurists turned international law of the period into an instrument of oppression, exploitation, and legitimization of colonial subjugation of the African nations.¹⁵ Frontier agreements were concluded with utter disregard for the cultural and national interests of the people. The British, for instance, attacked King Dosunmu of Lagos when he refused to surrender sovereignty over his whole territory. After he was conquered in war, he signed a treaty, stating:

I, Dosunmu, do with the consent and advice of my Council, give, transfer, and by these presents grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the port and the island of Lagos, with all the rights, profits, territories and appurtenances whatsoever thereunto belonging (and as well the profits and revenue and the direct, full and absolute

9. See AKE, *supra* note 4.

10. See *id.*

11. See BASIL DAVIDSON, *AFRICA IN HISTORY: THEMES AND OUTLINES* 286 (1991).

12. The last colonial loan on behalf of the country before Nigeria attained independence in 1960 was a 1958 World Bank loan to finance the Borno Railway Extension.

13. See DAVIDSON, *supra* note 11.

14. AKE, *supra* note 4.

15. See CHRIS OKEKE, *THE THEORY AND PRACTICE OF INTERNATIONAL LAW IN NIGERIA* (1986).

dominion and sovereignty of the said port, island, and premises, with all the royalties thereof, freely, fully, entirely, and absolutely).¹⁶

Sir Frederick Lugard, the notorious former Governor of Northern Nigeria, "preceded negotiations with short military actions in order to place himself in a position of strength," while Consul Ralph Moor of the Niger Coast Protective "moved up and down the Cross River with troops shelling and destroying villages before settling down to make 'treaties of friendship' with the frightened people."¹⁷ Lugard spoke of a "valuable concession purchased by the present of an old pair of boots."¹⁸ King Jaja of Opobo, an influential Nigerian Ibo Chief, found to his dismay that the meaning of "protection" could be elusive. He was denied trading rights even after assurances that the "protection" would leave his country while still under his government.¹⁹ Apart from the fact that the Chiefs of the colonial territories, with whom the British representatives signed the so-called treaties of cession or protection, were illiterates and ignorant and could not therefore have reasonably understood the full implications of the terms of the treaties written by Europeans in their own technical language, they had no mandate to dispose of the people's property.²⁰ This fact has been eloquently illustrated in one of the most celebrated cases regarding the legal effect of the Treaty of Cession, by which Lagos was supposedly ceded to the British Crown by King Dosunmu in 1861.²¹

The colonial state was so all-powerful not only to carry out its mission but also to survive along with the colonial order in the face of the resentment and the hostility of the colonized. In certain African countries, such hostility broke out into serious armed rebellion.²² The two principal features of the colonial state were absolutism and arbitrariness. For example, the colonial governments made the colonies produce the commodities they needed, not those that would benefit the colonized people.²³

16. Treaty of Cession at 1 (1861), *quoted in* Okeke, *International Law in the Nigerian Legal System*, 27 CAL. W. INT'L L.J. 311, 327 (1997).

Makau wa Mutua gives a succinct description of the unacceptable nature and character of the treaty signed by King Dosunmu:

The absolutist language of the "treaty," its one-sided capitulation by Dosunmu, and the complete, unconscionable "renunciation" over the sovereignty of his people, territory, and resources is of such absurdity that, if taken seriously, it would make a mockery of the notion of a treaty and the concept of freedom of contract.

See Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).

17. DAVIDSON, *supra* note 11.

18. *Id.*

19. *Id.*

20. OKEKE, *supra* note 15.

21. *Amodu Tijani v. Secretary, Southern Provinces* (1915), (1921), 3 N.L.R. 24, (1921) 2 A.C. 399. This case is regarded as the most celebrated legal action ever to have arisen in Nigeria, and indeed, West Africa, concerning African rights to land under a colonial system. The Tijani case has become the *locus classicus* on the whole subject of the nature of Crown ownership of colonial lands. See TASLIM OLAWALE ELIAS, *NIGERIA LAND LAW AND CUSTOM* 18 (1962).

22. The Kenyan Mau Mau independence armed insurrection led by Mzee Jomo Kenyatta against the British Colonial administration remains one of the foremost of such struggles against colonial powers. Similar to it in terms of strength and magnitude may be that of the Algerians against the French in their war for independence.

23. For example, when Gold Coast (now re-named Ghana at independence) was colonized, it did not farm cocoa. The colonial government decided that the country would be suitable ground for farming cocoa and duly introduced the crop. By 1865, the country started exporting cocoa, and by 1901, it was the leading producer of the commodity in the world. Ghana thus became a monocultural cocoa economy, and by 1939, cocoa accounted for 80% of the value of its exports. Kenya presents another good example. In Kenya, the Coffee Plantation Registration Ordinance of 1918 forbade the growing of coffee—the country's most profitable commodity. The purpose was to

2. *The Post Colonial Situation*

A great majority of the African countries gained political independence from their colonial masters in the 1960s, led by Ghana in the late 1950s. Although political independence brought some changes to the composition of persons that managed the states, the character of the state remained much as it was in the colonial era. It remained totalistic in scope with a statist economy. The colonial masters grudgingly accepted the inevitable following persistent nationalist pressures for independence. A handover of government was made to their chosen African successors—essentially those successors who could be trusted to share their values and be attentive to their interests. It must be pointed out that this approach did not succeed in all places. While it succeeded in places where decolonization was peaceful following negotiated and often compromise arrangements, it failed where it was occasioned by revolutionary struggle.

Essentially, the nationalist movement was a coalition of disparate groups united by their common grievances against colonial oppression.²⁴ Although the members of the coalition fought against the colonial power, they worried about the enormous power they were trying to wrestle from it; power they could not entrust to any one of them or even share in a way that could reduce political anxiety.²⁵ By the time independence was achieved in the early 1960s, the forces of disunity entrenched by the colonial powers' divide-and-rule policy in these countries grew very strong.²⁶ In an effort to deal with these forces of disunity, some African countries like Nigeria, for example, started independence with a complex federal constitution,²⁷ which in the last forty-two years has remained in constant review.

Contrary to the hopes expressed by some African leaders, that once independence was achieved all else would follow, the political environment at the time of independence was profoundly hostile to development.²⁸ What was more absorbing was the struggle for power rather than development, which was rather marginalized. The new African political elite that took over as managers of the newly independent countries passed on the responsibility for development to foreign patrons.²⁹ Greater emphasis was thus placed on attracting a flow to Africa from wealthy foreign countries of technical assistance such as more loans on better

make Africans available for wage labor by keeping them from becoming independent producers as well as to prevent them from stealing coffee from European farms by ensuring they could not legally possess coffee.

24. It was typically a network of nationalities, ethnic groups, religious organizations, syncretistic movements, secondary organizations, and professional interest groups. While they cooperated against the colonial regime for its exploitative, oppressive, and arbitrary character, their relationship was never free from tension and conflict.

25. AKE, *supra* note 4.

26. Examples are: Nigeria, Kenya, Ghana, Ivory Coast, Sierra Leone, Zambia, Uganda, Cameroon, and Zaire.

27. Nigeria has had at least eleven constitutions at different stages of its political development between 1914 and 2001. A number of them never had a chance of being officially promulgated after the appropriate Constitutional Drafting Conferences finished their work. These constitutions include both pre-independence and post-independence constitutions: Lugard Constitution of 1914; the Clifford Constitution of 1922; the Richard Constitution of 1946; the Macpherson Constitution of 1951; the Federation Constitution of 1954; the independence Constitution of 1960; the Republican Constitution of 1963 (was in operation until January 15, 1966 when the Civilian Government of Alhaji Abubakar Tafawa Balewa was overthrown in the first military *coup d'état*); the 1979 Presidential Constitution (overthrown four years later by the Buhari administration); the 1989 Constitution drafted under the Babangida administration; the 1996 Draft Constitution under the Sani Abacha regime; the 1998 Constitution under General Abubakar and the current draft Constitution under General Obasanjo.

28. Kwame Nkrumah of Ghana, *supra* note 6.

29. See AKE, *supra* note 4.

terms (which unfortunately was not the case), more foreign investment in Africa, accelerated transfer of technology, better prices for primary commodities, greater access to Western markets, and so forth.³⁰ During the 1960s and 1970s when the majority of the Afro-Asian countries became independent, after being devastated by the colonial exploitation described above, they had no capital to fuel the rapid economic growth that they hoped for.³¹ Therefore, the African countries had little option left, but to borrow to finance development and growth.³²

II. Human Rights and Debt Burden

The concept of human rights stems from the understanding that all human beings are born equal. The equality is in terms of dignity and rights. Foreign debt has an effect on the full enjoyment of economic, social, and cultural rights. While the world's poorest countries spend tens to hundreds of millions of dollars annually servicing their debts,³³ large segments of their populations remain without access to minimal health care, education, nutrition, clean water, adequate shelter, and other human needs.³⁴ At no time did the individual holders of basic fundamental human rights ever surrender them to the state. Rather, all that the individual surrenders to the state upon entering civil society is the right to have these rights enforced by the state.³⁵

An important international legal instrument on human rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁶ The ICESCR and the 1948 Universal Declaration of Human Rights³⁷ are recognized as part of the International Bill of Rights, and guarantee the right to adequate food, clothing, and shelter, the right to education, including free and compulsory primary education, and the right to special care and assistance for children.

States Parties to these multilateral international agreements are legally obligated to guarantee access to minimum essential levels of these basic human rights for all.³⁸ To continue to insist that poor states use their scarce resources for debt service payments, rather than for improved access to these basic human rights, the international community becomes an accomplice in the violation of human rights,³⁹ and invariably, international law.

The majority of indebted poor countries are mostly located in Africa.⁴⁰ These countries face a devastating debt burden. The external debt owed by developing nations was estimated

30. *See id.*

31. JOMO KENYATTA, *SUFFERING WITHOUT BITTERNESS: THE FOUNDING OF THE KENYA NATION* (1968).

32. John A. Bohn, *Governmental Response to Third World Debt: The Role of the Export-Import Bank*, 21 STAN. J. INT'L L. 461 (1985).

33. For example, Malawi, a subsistence farming country of 10 million people owes \$2.6 billion in foreign debts; Gabon owes \$4.6 billion in foreign debts; and Nigeria owes \$28.64 billion. GUARDIAN NEWSPAPER, Mar. 2, 2001. In all, only eighteen African countries have secured almost \$315 billion in debt.

34. Eric A. Friedman, *Debt Relief in 1999: Only One Step On A Long Journey*, 3 YALE HUM. RTS. & DEV. L. J. 191 (2000).

35. Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law*, 34 INT'L LAW. 149, 163 (2000).

36. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 933 U.N.T.S. 3, 6 I.L.M. 360 (1966) [hereinafter ICESCR].

37. Universal Declaration of Human Rights, Dec. 10, 1948, art. 25(1), G.A. Res. 217A(III), U.N. Doc. A/810 [hereinafter Universal Declaration].

38. ICESCR, *supra* note 36, art. 2.

39. Friedman, *supra* note 34.

40. In 1996, the World Bank and International Monetary Fund (IMF) formulated a debt relief plan, in which it designated a set of nations the Heavily Indebted Poor Countries (HIPC). As of April 2000, the HIPC

in 1997 at nearly \$2 trillion.⁴¹ The debts increased in the late 1970s, following rising interest rates and oil prices and failing commodity prices. All these impeded the ability of many countries to repay debts incurred in the early 1970s.⁴² African countries took advantage of the availability of credit at the time, borrowed enthusiastically, and made poor investments with their easy credit.⁴³ While much of the debt burden goes unpaid, the annual debt service paid by these nations is staggering and crippling.

Many of the world's poorest countries spend large portions of their budgets, which could have been spent on social services to benefit their people, on debt service payments to wealthy nations and international financial institutions. The magnitude of the human impact of the debt payments is enormous. According to the U.N. Development Program in its Human Development Report 1997, "if severely indebted countries could have kept the money devoted to servicing foreign debts, Africa alone would have been able to save the lives of about 21 million children by 2000 . . ."⁴⁴

According to Friedman, in 1997–98, for example, Tanzania spent \$189.2 million on debt service payments, more than it spent on either education (\$163.4 million) or health care (\$65.8 million).⁴⁵ Mauritania also spent more on debt service in 1998 (\$87.8 million) than on health and education combined (\$67 million), and almost five times more than on health care alone (\$17.4 million).⁴⁶ Mozambique spent \$159 million on debt service payments in 1998,⁴⁷ about \$40 million on health care,⁴⁸ and \$80 million on education.⁴⁹

The Nigerian picture is not different from that of other African countries. Speaking at a meeting with Kwesi Owusu, head of Jubilee 2000 UK Africa Initiative in Abuja on 21 March 2000, President Olusegun Obasanjo said:

The time for an international commitment of deep debt reduction and forgiveness is now. Our foreign debt stands at \$31 billion, and continues to rise, not because of any significant additional borrowing, but mainly as a result of the cost of servicing what was actually borrowed in the past. In these circumstances, it is simply not possible to speak of any significant measure of

countries, most of which were African, were: Angola, Benin, Bolivia, Burkina Faso, Burma (Myanmar), Burundi, Cameroon, Central African Republic, Chad, Republic of Congo, Cote d'Ivoire, Democratic Republic of the Congo, Ethiopia, Ghana, Guinea-Bissau, Guyana, Honduras, Kenya, Lao People's Democratic Republic, Liberia, Madagascar, Mali, Malawi, Mauritania, Mozambique, Nicaragua, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda, Vietnam, Yemen and Zambia. All of them are very impoverished and yet heavily indebted to wealthy creditors.

41. Shridath Ramphal, *Debt Has a Child's Face*, in UNICEF, THE PROGRESS OF NATIONS 1999, available at <http://www.unicef.org/pon99/debtcoml.htm>.

42. The debt of developing countries was partly a product of the decade 1974–84. At the time, the effective cartel strategy of the Organization of Petroleum Exporting Countries (OPEC) produced the great oil boom. Some of the surplus earned by OPEC members found its way to the industrialized market economies, whose banks began to have excess liquidity.

43. Ake, *supra* note 4.

44. UNDP, HUMAN DEVELOPMENT REPORT 1997, at 93 (1997), available at <http://www.undp.org/hdro/1997/97.htm>.

45. Friedman, *supra* note 34.

46. *Id.*

47. WORLD BANK, MOZAMBIQUE AT A GLANCE 2 (1999), available at http://www.worldbank.org/data/countrydata/aag/moz_aag.pdf.

48. IMF & Int'l Dev. Ass'n Republic of Mozambique, Initiative for Heavily Indebted Poor Countries (HIPC) Completion Point Document ¶ 15 (1999), available at <http://www.worldbank.org/hipc/country-case/mozambique/mozcompl.pdf>.

49. *Id.* ¶ 12.

development, for as long as we are obliged to allocate so much of our lean resources to debt servicing. It is morally unjustifiable for the poor people of Nigeria to suffer any longer⁵⁰. . . Nigeria is expected to divert over \$3.6 billion a year from social and economic development to service international debt.⁵¹

By diverting the lean resources to creditor countries and international financial institutions, debtor countries of Africa are unable to use available resources to realize for their people basic human, economic, social, and cultural rights that are contained in the major universally recognized International Bill of Rights. Both the Universal Declaration of Human Rights and the ICESCR guarantee the rights to adequate food, clothing, shelter,⁵² and the right to medical care and good health.⁵³

The international law of human rights includes numerous (and increasing) international agreements and other instruments, as well as recognized corpus of principles of customary law. Three principal instruments—the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (and its Optional Protocol), and the International Covenant on Economic, Social and Cultural Rights have, together, acquired the universal designation of “International Bill of Rights.”⁵⁴

The law of human rights begins with the United Nations Charter. The observance of the provisions of articles 55⁵⁵ and 56⁵⁶ of the Charter, which underline the essence of human rights, is imperative on states. This is important in order to create conditions of stability and well being that are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of people. When taken together with the International Bill of Rights, relevant resolutions of the United Nations General Assembly and other international bodies, and the practices and declarations of states, the Charter has created binding obligations.

Virtually every country in the world has recognized “that every child has the inherent right to life,” and states “shall ensure to the maximum extent possible the survival and development of the child.”⁵⁷ In 1997, a group of international law experts adopted what we

50. Jubilee 2000 South Africa, March 28, 2000, President Obasanjo appeals for immediate debt relief for Nigeria, *available at* <http://www.odiousdebts.org/odiousdebts/index.cfm>.

51. The budget for Nigeria's new Poverty Alleviation Programme (PAP), just approved by the Nigeria Senate, is \$100 million. At least half of Nigeria's 121 million population does not have access to safe clean water. Only 38% of children are immunized against measles and per capita spending on health is shockingly \$3. Cholera, meningitis, and other life-threatening diseases have taken root, and a severe AIDS crisis is fast developing. *Id.*

52. Universal Declaration, *supra* note 37, at 71.

53. *Id.*

54. LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* (3d ed. 1993).

55. Under this article, Member States shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. CHARTER art. 55.

56. All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in article 55. U.N. CHARTER art. 56.

57. Convention on the Rights of the Child, Nov. 20, 1989, art. 6(1), (2), G.A. Res. 44/25, U.N. GAOR, 47th Sess., 61st mtg., Supp. No. 49, at 166, U.N. Doc. A/RES/44/49 (1989), *reprinted in* 28 I.L.M. 1448 (1989).

may regard as the most comprehensive account of states' obligations with respect to the rights contained in the International Bill of Rights: "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights."⁵⁸

It is obvious that the majority of poor countries in Africa have vast segments of population that do not have access to education, basic health services, nutrition, housing, and safe drinking water. African states that fall within this category are in the majority and they are not in a position to satisfy even the minimal essential levels of economic and social rights. These states, the bulk of which include the HIPC countries, are deficient in meeting their obligations under international law.⁵⁹

The United Nations Committee on Economic, Social and Cultural Rights has affirmed that a state that does not meet its people's human rights by at least satisfying the minimal levels "is *prima facie*, failing to discharge its obligations under the Covenant."⁶⁰

Debt burden is not the only obstacle to social spending in every poor country that affects the realization of human rights. Other resource allocation decisions are also responsible. Military expenditure caused by wars and internal strife has been very high. A consistent pattern of human rights violations is a typical feature of war. Africa's wars have not been an exception. In addition to violations of civil liberties as both sides try to strengthen their grip on the population, war has brought deprivation of life and liberty on a massive scale, as well as widespread violations of personal security and integrity. Besides, the long-term effect of Africa's wars on the continent's cultures and societies, economy, wildlife,⁶¹ etc. is enormous. One of the HIPC countries, Ethiopia, at war with Eritrea, spent about \$380 million on arms purchases in 1999.⁶² Large debt burdens do, however, facilitate human rights violations in many countries. An example is Tanzania, one of the world's most impoverished countries: 51 percent of its people do not have access to safe drinking water, one-third of its children do not attend primary school, and the life expectancy is forty-eight years.⁶³ Tanzania's debt service payments in 1998 totaled \$158 million, money that could have been spent to provide greater access to potable water, primary schooling, and health services for the impoverished population.⁶⁴

Every country in the world except Somalia and the United States has ratified the Convention. See United Nations Treaty Collection, Status of Multilateral Treaties Deposited with the Secretary-General: Convention on the Rights of the Child. The Convention also requires States to "strive to ensure that no child is deprived of his or her right of access to . . . health care services" and recognizes "the right of the child to the enjoyment of the highest attainable standard of health." See *id.* art. 24(1).

58. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights were adopted unanimously by a group of over thirty international law experts in January 1997 at a meeting in the Netherlands. The Guidelines reflect the group's understanding of how international law has evolved since the adoption of the Limburg Principles on the Implementation of the ICESCR in 1986. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights is regarded as an authoritative guide of state obligations under the ICESCR. See Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. GAOR, Hum. Rts. Comm., 43rd Sess., Annex, U.N. Doc. E/CN.4/1987/17, *reprinted in* Hum. Rts. Q. 122 (1987).

59. Friedman, *supra* note 34; the average life expectancy in these countries is a mere fifty-one years—twelve years less than in developing countries overall, and twenty-six years less than in more developed countries of the world.

60. See ICESCR, *supra* note 36.

61. One of Africa's great natural resources.

62. Friedman, *supra* note 34.

63. *Id.*

64. *Id.*

A. CORRUPTION AS A FACTOR CONTRIBUTING TO VIOLATIONS OF HUMAN RIGHTS

Another major factor contributing to violations of human rights in Africa is government corruption. In the assessment of an erudite and foremost African International Jurist, Ndiva Kofele- Kale,⁶⁵ who has written extensively on the important subject of corruption "corruption of public officials is a practice that is not confined to any region of the world but occurs everywhere."⁶⁶ Even more so, corruption flourishes in countries where the culture of transparency and accountability is lacking; where republican institutions have been compromised; where the rule of law has broken down, and where market participants do not operate under an internationally accepted set of principles or standards.⁶⁷

The last six years have recorded a burst of law making at both the national and international levels on the subject of corruption. Therefore, many international organizations—such as the United Nations,⁶⁸ the World Bank, the IMF, the Council of Europe, the European Union,⁶⁹ the Organization of American States (OAS),⁷⁰ the Organization for Economic Co-operation and Development (OECD),⁷¹ the Global Coalition for Africa (GCA),⁷² and the International Chamber of Commerce—have adopted anti-corruption policies and strategies.⁷³

The Global Coalition for Africa in its recent study of corruption and development in Africa found that: "low salaries may partly explain the existence of petty corruption and theft at lower levels . . ."⁷⁴ As much as the element of low salaries may be partly responsible for petty corruption, the greatest type of corruption is the high-level bureaucratic corruption in Africa. Perhaps only two examples may, at this point, drive home the magnitude of

65. His most cited work on the subject of corruption is titled: *THE INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR ECONOMIC CRIMES: HOLDING HEADS OF STATE AND OTHER HIGH RANKING STATE OFFICIALS INDIVIDUALLY LIABLE FOR ACTS OF FRAUDULENT ENRICHMENT* (1995).

66. See Kofele-Kale, *supra* note 35. According to him, "corruption occurs in all countries and in many different forms. It tends to thrive when resources are scarce, and governments, rather than markets, allocate them; when civil servants are underpaid; when rules are unreasonable or unclear; when controls are pervasive and regulations excessive; when disclosure and punishment are unlikely." See also WORLD BANK, *GOVERNANCE AND DEVELOPMENT* 10 (1992).

67. Kofele-Kale, *supra* note 35.

68. The United Nations Organization, which was created in 1945 in San Francisco, now has a membership of 189.

69. Three important European Community treaties were designed to anticipate the importance and need of combating acts of fraud. The treaties include: Treaty Establishing the European Community (EC Treaty), Treaty Establishing the European Atomic Energy Community (Euratom Treaty), and Treaty Establishing the European Coal and Steel Community (Eurocoal Treaty).

70. The Inter-American Convention against Corruption, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter Inter-American Convention]. It is famed as the first anti-corruption treaty in the world that attacks the problem from both the supply and demand sides. See *id.* art. VI.

71. See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M.1 [hereinafter OECD Convention].

72. The Global Coalition for Africa (GCA), formed in 1991, is based in Washington D.C. Its principal objective is to forge policy consensus on development priorities among African Governments, their northern partners, and non-governmental groups working in and on Africa. Active in its formation were African governments, donor agencies and African-oriented international NGOs. For more on the GCA, consult its home page on the worldwide web at <http://www.gca-cma.org>.

73. See International Chamber of Commerce, *Recommendations to Combat Extortion and Bribery in International Business Transactions Report of the Ad Hoc Committee* (Mar. 26, 1996).

74. See Global Coalition For Africa, *Corruption and Development in Africa*, at 12, GCA/PF/N.2/11/1997 (1997) [hereinafter *Corruption in Africa*].

the damage done. The notorious cases of two recently deceased African military dictators are instructive; yet others are still alive and on the loose in Africa and other parts of the Third World.⁷⁵

Late General Sani Abacha of Nigeria seized power in a *coup d'état* in 1993, from an interim National Government of Chief (Dr.) Ernest Shonekan thrust on the people by another former dictator General Ibrahim Babangida.⁷⁶ He ruled Nigeria with an iron fist until his sudden death in 1998.⁷⁷ Also, Field Marshall Mobutu Sese Seko, in the thirty-two years as the head of state and incontestable ruler of the former Republic of Zaire,⁷⁸ succeeded in embezzling some \$4 billion of his nation's wealth.⁷⁹

Unfortunately, most of the stolen national wealth from these poor African countries is banked in offshore safe havens, mainly in Europe and America, and are hardly ever invested at home. In most cases, individual perpetrators of this crime of corruption succeed in leaving town to avoid prosecution by national courts. Consequently, the countries affected lose in every sense.

The fight against corruption, in order to be meaningful and reasonably successful, must be waged on all fronts—at national, regional, and international levels. Corruption should be criminalized and severely punished. Unfortunately, many African heads of state and governments, and high-ranking government officials are reluctant to take responsibility for failing to recognize openly that there is corruption in their countries, much less to take adequate measures to curb the corruption.⁸⁰ The Nigerian government of President Olu-

75. The member of this group with the longest tenure on the loose is Idi Amin Dada, 75, who ruled Uganda from 1971–1979, and oversaw the murders of up to 300,000 of his subjects. The Saudis gave him refuge, about \$1,400 a month, a house with a pool, and a car. Other strongmen still enjoying exile are Amin's equally brutal successor, Milton Obote, 75, who ran Uganda from 1980–85, now in Zambia; Jeane-Claude Duvalier, 49, Haiti's ruler from 1971–86, now in France; Alfredo Stroessner, 88, who ruled Paraguay from 1954–89, now in Brazil; and Raoul Cedras, Haiti's military boss from 1991–94, now in Panama.

76. General Ibrahim Babangida (Rtd) was the longest despot Nigeria has ever had. He headed the longest military administration in Nigeria (1985–1993) and is widely reputed among Nigerians as the man that entrenched corruption as a "legitimate" method of government business.

77. Based on the credible estimates of *Times of London*, Abacha is believed to have stashed in European banks more than 3.6 billion pounds sterling (approximately \$5.4 billion) during his five-year tenure as head of state of Nigeria. His national security adviser withdrew close to \$2.45 billion from the Central Bank of Nigeria ostensibly to pay back debts owed to Russian contractors for the construction of the giant Ajaokuta Steel Plant. Furthermore, according to a Government White Paper, the Nigerian government under the Babangida administration earned \$12.225 billion from sales of surplus petroleum during the 1990–91 Gulf War. Of this amount the military generals made away with \$12 billion and only \$225 million trickled back into the national treasury.

78. Now it is called the Democratic Republic of the Congo, a new name assumed under the late head of state, Laurent Kabila, who was recently assassinated by his bodyguard. Laurent Kabila overthrew Mobutu with the support of his band of loyal guerilla fighters in May 1997, and in September of the same year, Mobutu died in exile in Morocco.

79. See Seidi Mulero, *Nigeria: Use Stolen Billions to Pay the Debt*, IPS, Aug. 10, 1998, available at WL INTERPS File.

80. Transparency International's (TI) from 1996 to date has consistently ranked Nigeria as the most corrupt country in the world. Rather than honestly and realistically addressing this problem, there has been sovereign resistance to the corruption label. In fact, one Nigerian government official responded to the accusation that the government of Nigeria was doing little to salvage the image of Nigeria internationally in this regard by remarking that "there is corruption everywhere." Such an answer misses the point for, while nobody argues that corruption has boundaries, it is difficult to read about heads of state or government officials of the United States, United Kingdom, France, Switzerland, Japan, Canada, etc. investing their looted money in African banks. They have the common sense to invest the money in their own countries.

segun Obasanjo has managed to get an anti-corruption legislation passed by the Nigerian legislature. The provisions of that law have been heavily criticized as not going far enough. It must be acknowledged, however, that it is a move in the right direction at the national level even though it is yet to be seen how effectively its enforcement is going to be carried out by the Nigerian Courts.

So far the two methods of enforcing violations of crimes under international law are either: (1) the direct method through an international criminal tribunal or (2) the indirect method through a national court. Many times there are more problems in adequately and satisfactorily relying on a domestic legal regime in fighting against corruption because of heavy dependence on the political mood of the day.⁸¹

III. Debt Relief Plans

Recently, debt relief, as a measure for relieving the poor countries of their debt burden, was considered to have a positive effect on such countries. The discussion on this recipe is therefore relatively new. The first significant movement on debt relief came in 1994.⁸²

The HIPC initiative, embarked on by the World Bank and IMF in 1996, increased the bilateral debt relief to 80 percent and introduced multilateral debt relief. By this initiative, a HIPC special Trust Fund was created and administered by the World Bank to provide debt relief to qualified HIPC countries on debt owed to certain multilateral institutions.⁸³ The contribution to the Fund was made by the World Bank and approximately twelve donor states.⁸⁴ The HIPC initiative conditioned debt relief upon IMF-structured economic reforms, which countries were required to implement for three years, and only after three years of the reforms would they receive debt relief. Most of the IMF-structured reform conditions were found to be stringent and draconian and counter to positive reform. Under the IMF reform conditions, governments were required to end subsidies on basic goods, making them less affordable to the poor; to cut budgets, meaning simply to reduce public expenditures, and to privatize state-run enterprises, which reduces employment.⁸⁵ In the case of the Nigerian government, she was in large part willing to fulfill a majority of the conditions required by the World Bank and IMF. However, the state got involved in dead-locked negotiations with the multilaterals for three years over its refusal to comply with some key conditions.⁸⁶

The idea of debt relief as an option for helping the poor, indebted countries of the world has received several different critical comments; some in favor and others in strong condemnation of the measure favoring total debt forgiveness.

81. Kofele-Kale, *supra* note 35.

82. The leading industrialized nations of the world made up of the United States, United Kingdom of Great Britain and Northern Ireland, Germany, France, Japan, Italy, and Canada agreed to a two-thirds reduction of bilateral debt that the HIPC countries owed the G7 countries individually.

83. See HIPC Debt Initiative, World Bank (2000), <http://www.worldbank.org/hipc/about/hipcbr/hipcbr.htm> [hereinafter World Bank, HIPC initiative].

84. See 1999 World Bank Ann. Rep. 14, World Bank (1999). Another contributor to the Fund was the African Development Bank Group.

85. The World Bank and creditor clubs also collaborate with the IMF and jointly insist on the fulfillment of conditions and the receipt of an IMF seal of approval before concluding any meaningful agreements.

86. These conditions include: removal of petroleum subsidy, privatization, trade liberalization, and devaluation. Each and every one of these conditions has met with stiff opposition by the Nigerian public, particularly the majority poor who suffer the brunt of those measures more.

To those in support of the debt relief measure, one common argument is that debt relief would allow countries to spend significant portions of their budgets on improving the lives of their people. But the crucial point that is often forgotten is that the budgets of these countries are already very small and insignificant for the type of problems facing them. The opposing point of view on debt relief is that it leaves the poor countries indeed worse off.⁸⁷ According to Oxfam, the debt relief package that the World Bank and International Monetary Fund are offering Zambia is fraudulent.⁸⁸ On the other hand, numerous authors have argued that debt relief does not necessarily stimulate growth. Although debt reduction might not be especially beneficial in helping to generate growth, it is a cheap way to ease the burdened economies of heavily indebted countries.⁸⁹ Debt reduction, others argue, must be coupled with good economic policies in order to improve the debtor countries' prospects for economic stability.⁹⁰ The effectiveness of HIPC initiative is questionable, partly because of the major obstacles of its implementation. Even the criteria upon which certain African countries were dropped from the list of HIPCs is seriously questioned.⁹¹ The effect of HIPC debt relief is therefore far less clear in some countries that have benefited from the initiative than in others. The two vital considerations behind the HIPC initiative and its connection to structural adjustment reforms are: the desire to have the savings on debt relief used effectively and to help create a political-economic structure that will lead to economic growth, thereby enabling a country to better meet its people's needs independently.

It is our view that much as these are laudable aims, what is more important is the speedy response to the basic needs of the poor people.

IV. The Legitimacy and Legality of the Third World's Nation's Claim for Debt Forgiveness

The debt burden of Africa is so great and the capacity to repay so limited that it is increasingly necessary to think not in terms of servicing, but in terms of the idea of complete debt forgiveness. Recently, a number of African heads of state have renewed their strong call for debt forgiveness.⁹² There is no sign that Africa's creditors will cancel its debt on a large scale or grant the continent substantial relief. There is no chance that Africa can pay

87. See Charlotte Denny, *Debt Relief Leaving the Poor Worse Off*, THE GUARDIAN, Aug. 21, 2000, available at <http://www.guardian.co.uk/imf/story/0,7369,370376,00.html>.

88. Oxfam claimed that, based on a confidential report from the IMF available to it, Zambia's interest payments are set to rise from \$136 million (£ 91 million) in 1999 to \$235 million in 2002, even though it is expected to enter the west's official debt relief programme in October 2000. It called on the Fund to write off all the money owed to it by Zambia over the next few years instead of offering the country limited debt relief.

89. See Paul Krugman, *Debt Relief is Cheap*, FOREIGN POL'Y, Fall 1990, at 141.

90. See Masood Ahmed & Lawrence H. Summers, *Ten Lessons of the Debt Crisis*, INT'L ECON. INSIGHTS, July/Aug. 1992, at 15, 18.

91. For example, Nigeria, originally an HIPC country, but dropped, requires debt relief. Nigeria spends about \$1.9 billion a year on its debt service, compared with \$300 million per year on health infrastructure. This amounts to only about \$3 per person in Africa's most populous country of about 121 million, where 51% of the population lacks access to safe water and the infant mortality rate is 112 per 100 live births.

92. As International Monetary Fund and World Bank chiefs toured Africa, many African leaders asked that they forgive and forget old debts. Nigerian President Olusegun Obasanjo is among the most insistent; his promised economic and democratic reform is burdened by an estimated \$30 billion in debt inherited from former military regimes. But so is Omar Bongo, Gabon's leader for thirty-four years, who rode out the IMF and World Bank's free-lending Cold War era in a gold-plated Cadillac.

its debts or even grow out of them, because the very reasons that call forth and sustain the debt also constrain economic growth.

The request for debt forgiveness calls for plausible and convincing answers to a number of critical questions: Who benefits if African debt is forgiven? Does forgiveness of debt relieve or further burden present and future generations of Africa? What purpose does forgiveness of the debt achieve? Even if all of Africa's debts were canceled, would it make much difference as long as those conditions, such as inappropriate policies, corruption, disarticulated economies, and Africa's location in the international division of labor remain? Most importantly, does forgiveness of foreign debt have any precedent(s) or justification in the jurisprudence of international law? What would be the best strategy for solving the problem since the approaches introduced in recent years ranging from debt rescheduling to debt relief appear not to have had much significant impact in alleviating the pains of all the parties concerned?

Of all the important questions listed above, the most immediate and pertinent to our discussion is the legitimacy and legality of the call for debt forgiveness under international law. If there are but only good moral arguments by the South for debt forgiveness unsupported by sound and indisputable legal case, the whole matter becomes problematic.

The Africans make not only compelling moral arguments to cancel its foreign debts, but also have an indisputable legal basis because the overwhelming majority of those debts are odious in law. The legal doctrine of odious debts was given shape by a renowned international law scholar, Alexander Nahum Sack, a quarter of a century after the settlement of the Spanish-American War.⁹³ Also, most recently Patricia Adams lent strong support to the theory.⁹⁴ Sack's debt theories dealt with the practical problems created by transformations of state. With colonial territories becoming independent nation states and colonies changing hands, with monarchies being replaced by republics and military rule by civilian, with constantly changing borders throughout Europe, and with the ascendant new ideologies of socialism, communism, and fascism overthrowing old orders, liability for public debts should remain intact.⁹⁵ These debts represent obligations of the state—the state being the territory, rather than a specific governmental structure.⁹⁶ Obviously Sack based his reasoning not on some strict dictate of natural justice, but on the exigencies of international commerce. He believed that without strong rules chaos would reign in relations between nations, and international trade and finance would break down.⁹⁷

But Sack also recognized that debts not created in the interests of the state, as was the case in many African colonial setting and oppressive governmental administration such as the apartheid regime in South Africa, should not be binding on such state(s).⁹⁸ That kind

93. Alexander Sack authored two major works on the obligations of successor systems. See ALEXANDER SACK, *EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES* (The Effects of State Transformations on Their Public Debts and Other Financial Obligations and The Succession of the Public Debts of the State) (1927).

94. See PATRICIA ADAMS, *ODIOUS DEBTS: LOOSE LENDING, CORRUPTION, AND THE THIRD WORLD'S ENVIRONMENTAL LEGACY* (1991), excerpt of chapter 17, available at <http://www.odiousdebts.org/odiousdebts/index.cfm/DSP=subcontent&AreaID=3>.

95. SACK, *supra* note 93.

96. *Id.*

97. ADAMS, *supra* note 94.

98. *Id.*

of debt would not qualify under the general rule requiring obligations on the part of the state. Some debts, he said, were "*dettes odieuses*."

If a despotic power incurs a debt not for the needs or in the interest of the State, but to strengthen its despotic regime, to repress the population that fights against it, etc., this debt is odious for the population of all the State.

This debt is not an obligation for the nation; it is a regime's debt, a personal debt of the power that has incurred it, consequently it falls with the fall of his power.

The reason these "odious" debts cannot be considered to encumber the Territory of the State, is that such debts do not fulfill one of the conditions that determine the legality of debts of the State, that is: the debts of the State must be incurred and the funds from it employed for the needs and in the interests of the State.

"Odious" debts, incurred and used for ends which, to the knowledge of creditors, are contrary to the interests of the nation, do not compromise the latter – in the case that the nation succeeds in getting rid of the government which incurs them—except to the extent that real advantages were obtained from these debts. The creditors have committed a hostile act with regard to the people; they can't therefore expect that a nation freed from a despotic power assume the "odious" debts, which are personal debts of that power.

Even when a despotic power is replaced by another, no less despotic or any more responsive to the will of the people, the "odious" debts of the eliminated power are not obligations for the new power. . .

One could also include in this category of debts the loans incurred by members of the government or by persons or groups associated with the government to serve interests manifestly personal – interests that are unrelated to the interests of the State."⁹⁹

In recent times, the debate on the nature of debts owed by the poor countries has gathered momentum with a strong argument that part of the poor countries' debts are odious.¹⁰⁰ In Nigeria, the newly elected government of President Olusegun Obasanjo has called at least half of Nigeria's debt "dubious" when "the people who gave those loans knew that the money wasn't being spent wisely, in the interest of the people. Perhaps they even took their own cut."¹⁰¹ Vast sums of public funds have been stolen and transferred out of Nigeria in the past twenty years. A large portion of this stolen money is deposited in banks in the west, including the United States, Switzerland, and the United Kingdom. And yet the banks that frequently dismiss Nigeria as a corrupt country are the very ones that continue to cite the convenient doctrine of confidentiality as an obstacle that prevents them from assisting Nigeria in tracing and recovering these funds.¹⁰² Of course, the fact is that Nigerians who in the past have deposited these funds with them, are equally guilty of an infringement of law. Profiting from stolen goods is just as culpable as stealing the goods in the first instance. This calls for the need for an international solution to the problem of stolen wealth.¹⁰³

99. *Id.*

100. The Canadian Ecumenical Jubilee Initiative has collected 635,000 signatures on petitions to the Canadian government.

101. The Government is vigorously taking steps to recover some of the stolen money "stashed away" in foreign banks. In a recent press interview, the Nigerian Information Minister, Professor Jerry Gana, announced that so far the Federal Government of Nigeria has recovered the total sum of \$66 million from the looted monies of the members of the previous administrations through freezing of accounts and subsequent legal action." See Jane Ezereonwu, *Loot: Government Recovers N66 billion*, NIGERIAN GUARDIAN NEWSPAPER, July 14, 2000, available at <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&contentID=972>.

102. *Id.*

103. *Id.*

In South Africa, the Alternative Information and Development Center started the debate over the legitimacy of the debts incurred by the apartheid regime in a newly published book.¹⁰⁴ The Truth and Reconciliation Commission recommended that responsibility for the payment of the previous government's "odious debt" be critically considered. Desmond Tutu's successor, Archbishop Njongonkulu Ndungane of Cape Town, argues that South Africa's debts were largely incurred under the apartheid regime to suppress the majority population and should be declared odious and written off.¹⁰⁵

The Doctrine of Odious Debts, by Alexander Sack, the world's pre-eminent legal scholar on public debts, remains the ultimate legal source on that subject. The doctrine, though now seventy years old, helps bring clarity to today's complicated Third World debt situation, and fairness to a tragedy in which innocent Southern citizens pay, and corrupt and negligent borrowers and lenders get away scot-free. The doctrine of odious debts is not the only legal tool available to challenge Third World debts. Some valid international law principles exist to support forgiveness of debts.

Generally, an act of a state that is not in conformity with an international obligation is an internationally wrongful act entailing responsibility on the part of the state. However, under some circumstances, an inference of wrongfulness is precluded. The circumstances that are generally considered to have this effect are consent, *force majeure*, and fortuitous events, distress, and necessity.¹⁰⁶ Of all the available circumstances precluding wrongfulness and relevant to the Third World debt burden, the principle of necessity is the most appropriate to their case.¹⁰⁷ Necessity is similar to self-defense in that both involve a right to act to safeguard essential state interests. A state may invoke necessity to avoid payment of a financial debt on the ground that payment would clearly entail such disruption of its public services as to jeopardize public order and the economic life of the country. The Greek government offered this defense for its failure to pay awards of an arbitral tribunal to

104. JEFF RUDIN, CHALLENGING APARTHEID'S FOREIGN DEBTS (1997), available at http://aidc.org.za/adc/adc_booklet_menu.html.

105. See Odious Debts Campaigns, available at <http://www.odiousdebts.org/odiousdebts/index.cfm> (Mar. 1, 2001).

106. Two other categories of state conduct may also be considered to exclude wrongfulness: self-defense and counter-measures.

107. Article 33 of the I.L.C. Draft Articles on State Responsibility reads as follows:

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
 - (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
 - (b) the act did not seriously impair an essential interest of the State toward which the obligation existed.
2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
 - (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
 - (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
 - (c) if the State in question has contributed to the occurrence of the state of necessity.

Available at <http://www.law.com.ac.uk/reil/ILCSR/arts.htm>.

Belgium.¹⁰⁸ The Belgian government questioned the fact of inability to pay and also declared that such inability, if verified, would justify a suspension of payment, not a final discharge of the debt. The court implicitly accepted the basic principle that, if verified, the inability of Greece to pay would justify nonpayment.¹⁰⁹

For creditors to expect any protection in their loans to foreign states their loans must be utilized for the needs and interests of the state, otherwise the loans belonged to the power that contracted them, and were therefore, "*dettes de regime*." To avoid arbitrarily repudiated debts, and to ensure that the doctrine of odious debts is not open to abuse by self-serving interpretation, Sack proposed that a new government be required to prove that the debt ill-served the public interest and that creditors were aware of this.¹¹⁰ Following these proofs, the onus would be upon the creditors to show that the funds were utilized for the benefit of the territory.¹¹¹ If the creditors could not do so before an international tribunal, then the debt would be unenforceable.¹¹²

V. Conclusion

In order to improve and advance human rights in Third World countries, the reduction of poverty is imperative. Debt relief and forgiveness are important and indispensable in achieving this laudable objective. However, African leaders on their part must demonstrate sufficient determination and good faith in the way they handle public funds. They must be prepared to join hands in a cooperative effort with the IFIs and wealthy western countries to recover all ill-gotten loots from the poor countries and stashed away in private accounts of foreign western countries. If this is satisfactorily done, the poor countries should make do with internally generated revenue. A moratorium of at least ten years should be placed on foreign loans. Where loans become inevitable, foreign donors must start to deal with the real people through their elected representatives as well as notable indigenous NGOs and bring them into the conversation. Ultimately, it is vital that the African countries shape up their economies by increasing productivity, reducing waste and taking positive measures to encourage investments, both local and foreign.¹¹³

108. *Societe Commercial de Belgique (Greece v. Belgium)*, P.C.I.J., (ser. C) No. 87, at 101, 141.

109. P.C.I.J. (ser. A/B) No. 78 at 19. *See also Rainbow Warrior* (New Zealand v. France) 82 I.L.R. 499 (France-New Zealand Arbitration Tribunal 1990).

110. Sack, *supra* note 93.

111. *Id.*

112. *Id.*

113. Frank X. Njenga, *The African Debt Problem: Legal and Institutional Dimensions*, 2 AFRICAN YEARBOOK OF INTERNATIONAL LAW 95, 107 n.2 (1994), available at <http://www1.uj.es/epd/English/ybook.htm>.

